SOCATS ET AL. (ON RECONSIDERATION)

IBLA 81-740, 82-64,
82-648, 82-660, 82-717 Decided April 4, 1983

Appeals from decisions of the Medford District Office, Bureau of Land Management, denying protests to adoption of vegetative management programs. OR 110-81-83, OR 110-82-75.

Affirmed as modified.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

> A decision to implement a vegetative management program will be affirmed insofar as it is based on an environmental assessment which reflects an evaluation of the environmental impacts of the program sufficient to support an informed judgment. However, to the extent the record does not show that a salient aspect of the program has been assessed, and that aspect falls within the scope of the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

APPEARANCES: Phyllis Cribby for Southern Oregon Citizens Against Toxic Sprays; Christopher Bratt, co-chairman, Applegate Citizens Opposed to Toxic Sprays; Charlie Vaughan, pro se; Donald P. Lawton, Esq., and Eugene A. Briggs, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Once again the Board has been asked to consider the 1981 and 1982 vegetative management programs for the Medford, Oregon, District of the Bureau of Land Management (BLM). BLM determined to treat more than 30,000 acres of public lands to suppress the growth of nonproductive species by various treatments including herbicide application, burning, manual methods, and combinations of these. The decisions were based on the Vegetation Management with Herbicides, Western Oregon, 1978-87, Final Environmental Impact Statement

(EIS), the 1982 Supplemental Environmental Assessment OR-110-82-75, and amendments 1 and 3 to the 1981 Final Vegetative Management Program Supplemental Environmental Statement.

By orders dated December 8 and 20, 1982, this Board dismissed appeals of the denials of five protests against the implementation of these vegetative management programs. The orders stated that the appeals were rendered moot in light of the opinion and orders in Southern Oregon Citizens Against Toxic Sprays v. Watt, Civil No. 79-1098-FR, dated September 9, 1982, and October 20, 1982, enjoining BLM from further herbicide spraying in the Medford District until it fully complies with 40 CFR 1502.22.

Southern Oregon Citizens Against Toxic Sprays (SOCATS), the protestant in three of these appeals, petitioned for reconsideration, arguing that issues exist which the district court did not address and which the Board should resolve. SOCATS asserts that these issues involve matters within the Board's jurisdiction. SOCATS argues that by proceeding with its program on the assumption that the Board will dismiss all herbicide appeals, thereby continually mooting such appeals, BLM effectively frustrates the Board's administrative review function and denies appellants the right to appeal set forth in 43 CFR 4.1 and 4.410. SOCATS also emphasizes six issues which it claims have not been addressed in the EIS or any of the supplementary documents. Charlie Vaughan and the Applegate Citizens Opposed to Toxic Sprays (ACOTS) have also requested reconsideration of the Board's orders. ACOTS states that since herbicide spraying continues on progeny test sites, "the questions we raised remain to be answered."

On November 17, 1982, BLM filed a motion with the district court seeking modification of the injunction to permit herbicide use on study areas, test sites, and seed orchards in the Medford District. SOCATS filed a memorandum with the court stating that these appeals were dismissed for mootness, thus precluding review of additional issues not considered, and urging any modification be conditioned on reinstatement of the appeals by the Board. The court's December 15, 1982, order exempted many sites from the injunction and provided that the order would be vacated upon SOCATS' request if these administrative appeals were not reinstated by the Board.

Thereafter, BLM entered an appearance and petitioned for reinstatement of these appeals and suggested that the Board examine them on their merits or dismiss them for lack of jurisdiction. In response to a December 22, 1982, Board order directing a response to the SOCATS petition for reconsideration and a discussion of "the proper operation of 43 CFR 4.21.(a) in the context of such appeals," BLM responded to the six specific issues SOCATS raised, stating that these issues had been addressed in the EIS and subsequent supplementary documents or were "implicit in that material." It added that it had been relying on previous Board orders dismissing such appeals on grounds of lack of jurisdiction because the March 15, 1979, decision authorizing use of herbicides was made by the Secretary. 43 CFR 4.410.

In our last case on this subject (dealing with the 1981 Medford District program), Dolores M. Lisman, 67 IBLA 72 (1982), we stated:

We cannot agree with the Solicitor that this appeal must be dismissed for lack of jurisdiction. Clearly the Board has no jurisdiction to review actions implementing the Secretarial decision to use herbicides (other than Silvex) in the vegetation management program in Western Oregon within the context of the EIS. 43 CFR 4.410; Texas Oil and Gas Corp., 46 IBLA 50 (1980). However, implementation of the decision to use herbicides may give rise to issues entirely outside the scope of the Secretary's decision, which was confined, we believe, to the appropriateness of using herbicides in the management of forest vegetation within the broad context of factors considered in the EIS. See A.C.O.T.S., 60 IBLA 1 (1981). One such issue is whether a BLM district office has adequately considered alternatives for vegetation management, other than the use of herbicides, at a particular site. Reversal on appeal in such a context would not be contrary to the Secretary's decision regarding use of herbicides, but, rather, would constitute a finding that BLM has not adequately considered other alternatives to the use of herbicides.

Moreover, we believe that this approach is consistent with our duty to ensure that, in preparing an environmental assessment, BLM has developed a reviewable record reflecting consideration of "all relevant factors," in view of the fact that such an assessment is precedent to a threshold determination whether a full environmental impact statement should be prepared. Lane County Audubon Society, 55 IBLA 171 (1981); see Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir.), cert. denied, 409 U.S. 990 (1972); Elaine Mikels, 44 IBLA 51 (1979).

67 IBLA at 74-75.

Thus, in such cases the Board has authority to determine the extent of its jurisdiction, that is, whether activities are involved that are outside the scope of the Secretary's original decision and, if they are, whether all relevant factors were considered in the environmental assessment of those activities. The Board would also have jurisdiction where an activity was shown to be in violation of the Secretary's decision. A.C.O.T.S., 60 IBLA 1 (1981). Where the issue is whether the program includes an activity not within the scope of a decision originally made by the Secretary, the Board must determine whether or not it has jurisdiction. Where timing of the program is important, the Board's determination can be significantly expedited if both the appellant and BLM are represented before the Board and those representatives promptly provide concise arguments supported by specific references to the record. If matters are urgent, the proper course of procedure is to seek immediate relief in accordance with 43 CFR 4.21(a). California Association of Four-Wheel Drive Clubs, 38 IBLA 361, 366 (1978).

[1] For each of the issues raised by appellants the question is whether it is sufficiently analysed in the EIS and the supplemental environmental analyses to enable BLM to make an informed judgment concerning the impacts of the vegetative management program. See Lane County Audubon Society, supra at 179. We have examined these documents with respect to each of the issues raised in appellants' appeals of the denials of their protests and find that,

although some could certainly have been more thoroughly discussed, the analyses were adequate for such informed judgments in all instances save one. BLM acknowledges that there is no detailed discussion of the use of the "heliotorch" or "aerial drip torch," an aerial ignition technique for controlled burning described by SOCATS as "aerial application of flaming jellied gasoline." 1/ BLM suggests that this technique is "no different than other ignition methods" and that it was therefore implicitly addressed. The discussions of burning on pages 8-19 and 8-20 of the EIS and on page 3 of the 1982 supplemental environmental assessment, however, do not mention aerial ignition, and it is inadequate to say merely that its use in other BLM districts or by the Forest Service has "proven very successful" (1982 Supplemental Environmental Assessment at 22). It is thus within our jurisdiction to hold that BLM's decision concerning this aspect of SOCATS' protest is in error. Therefore, pending adequate analysis of all relevant factors concerning the impacts of this technique in this context, it cannot be employed in the Medford District vegetative management program.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellants' petitions for reconsideration are granted, BLM's petition for reinstatement is granted, and BLM's decisions are affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge.

1/ SOCATS stated in its appeal dated Mar. 26, 1982, at page 3:

"We reviewed all the information on this method that was available at the Medford Office, which did not include any data on operational use in Oregon, although the method has reportedly been used in the state during the past two years (but not in the Medford District). The available reports on the first U.S. use in the Mendocino National Forest in 1979 referred to incidents attendant with that operation, but did not include description of them. However, the recommendations resulting from that experience expressed the need to explore use of a better (less volatile) fuel that would be safer and easier to handle and mix. It is revealed that the mixing operation is extremely important and that a poor gel/gas mix could have a drastic effect on the success of the operation. The mixture is applied in golfball to baseball sized 'droplets' which burn from 8 to 17 minutes, causing a rapid, hot burn. Regarding public safety, the report states: 'The heliotorch can brush at such a rapid rate that if anyone was in the vicinity, they could be in trouble. If burning is planned near trails and/or recreation areas, public safety must be considered.'

"Many issues are involved with this method that are not present in other types of burning operations; it is not 'just another method of ignition'."